BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RADLEY R. TROWBRIDGE Claimant	)	
VS.	)	Docket No. 1,039,456
SHERWIN WILLIAMS COMPANY Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the June 21, 2010, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 8, 2010. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. Alexander B. Mitchell, II, of Wichita, Kansas, appeared for claimant. Larry Shoaf, of Wichita, Kansas, appeared for the self-insured respondent.

In the June 21, 2010, Award, the Administrative Law Judge (ALJ) determined claimant was injured out of and in the course of his employment with the respondent on January 3, 2008, and that respondent had notice of claimant's injuries. The ALJ found that as a result of his work-related injuries with the respondent, claimant had a 5 percent whole body functional impairment. The ALJ determined claimant was entitled to receive permanent disability benefits for a 61.5 percent work disability[1] after averaging a 100 percent wage loss with a 23 percent task loss. With regard to task loss, the ALJ found Dr. Pedro A. Murati did not give an opinion expressed as a percentage and only spoke of 79 "no's." Additionally, the ALJ found that although Dr. Chris D. Fevurly stated claimant's injuries were a temporary aggravation, the doctor still placed restrictions on the claimant, which were identical to claimant's pre-injury restrictions, and it was Dr. Fevurly's opinion that claimant had lost the ability to perform 23 percent of the tasks he had performed before the work-related injuries. As indicated above, the ALJ found claimant's task loss was 23 percent.

[1] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that if a work-related accident occurred, the date of accident was December 31, 2007, rather than January 3, 2008, as found by the ALJ. The parties further agreed that the record to be considered by the Board should include all of the exhibits offered and admitted at the May 8, 2008, preliminary hearing.

ISSUES

Respondent denies claimant met with personal injury by accident and denies that the alleged injury arose out of and in the course of claimant's employment with respondent.

Respondent contends claimant's preexisting low back impairment is well documented and it is questionable whether there was an accident that arose out of and in the course of the employment with respondent, particularly in light of credibility issues regarding claimant. Respondent argues the Board should find claimant has not sustained his burden of proof that this claim is compensable. Respondent alleges there are flaws in claimant's arguments regarding objective evidence of physiological changes after the injury. It argues that claimant sustained no additional impairment or work restrictions above the 20 percent to 30 percent military service-related disability he had before he went to work for respondent, which he intentionally did not disclose when applying for employment, and that claimant is not entitled to a work disability. Respondent admits it was not able to accommodate claimant with a job within claimant's work restrictions after the alleged injury but states it could not have hired claimant in the first place under these restrictions. Respondent asserts claimant has at best proven he sustained a temporary aggravation of a significant preexisting condition and at most is entitled to an award of the medical treatment and temporary total disability compensation paid by respondent to date. Should the Board find some additional permanent injury to claimant resulted from his employment with the respondent, respondent maintains it should be at most an additional 5 percent impairment of function. If the Board determines claimant has sustained his burden of proof establishing an entitlement to work disability, respondent asserts the work disability should include a wage loss only as the task loss is based on restrictions that are the same before and after the date of injury.

Claimant contends there is ample evidence respondent had timely notice of the accident; claimant's supervisor was notified the same day as the accident and it was the supervisor who took claimant to the emergency room for treatment that day. Claimant contends a finding of a permanent injury and a 10 percent functional impairment are supported by the evidence. Claimant argues the evidence supports at least an 82 percent work disability based upon a 100 percent wage loss and a 64 percent task loss as opined by Dr. Murati. Claimant maintains he is entitled to 59 weeks of temporary total disability compensation at $510 per week, 33 weeks of permanent partial disability compensation at $359.30 per week for those weeks he found work (he has had two jobs since his injury),

and 207.3 weeks of permanent partial disability compensation at $510 per week, up to the statutory maximum.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment at respondent?

(2) What is the nature and extent of claimant's permanent partial disability, if any?

FINDINGS OF FACT

Claimant was in the military service for 13 1/2 years. He received a medical discharge in 2005 because of a service-related injury he received while deployed to Iraq. He testified that while in Iraq, he fell down some stairs and as a result suffered two compression fractures and a ruptured disc in his back. He was given a medical discharge and eventually moved back to Wichita. He worked for his brother's landscape business for a couple of months and in September 2007 he began working for respondent.

Claimant admits when he filled out his application at respondent he did not disclose his prior back injury. He said when he came back after being discharged from the service, he was unable to find a job. He said no one would hire him because of his injury in Iraq, so he decided not to say anything about his back condition in order to get a job.

Claimant's first job at respondent was as a tank washer, where he would clean the tanks. A little more than a month later, he was promoted to a paint maker, where he would mix the ingredients to make the paint. The job as a paint maker was a very physical job that required claimant to perform heavy lifting.

Claimant testified that on December 31, 2007, he was moving a pallet with a hand jack. As he was pulling the pallet, one of the wheels got caught in a rut in the floor. He tried to get it out by pushing and pulling. Claimant said he pulled one too many times and pulled something in his back. He immediately felt a shot of pain in his right upper groin area. He fell to the floor and laid there until another employee, Jarrod Westin, asked him if he was okay. Claimant first told Mr. Westin that he would be all right, and Mr. Westin helped him up off the floor.

Claimant said his supervisor, Victor Megia-Toscano, heard about the incident and asked claimant if he was okay. Again claimant said he would be all right. But after about 15 to 20 minutes, claimant could no longer take the pain. He told Mr. Megia-Toscano that he would like to go to the emergency room but did not think he could drive. Mr. Megia-Toscano then volunteered to drive claimant to the Veterans Administration Hospital (VA). At the VA, claimant was given two trigger point injections in his spine and was put on restrictions not to lift over 25 pounds and to limit weight bearing to 4 hours per day for 30

days. He also was taken off work for a period of three days. When claimant gave his restriction notice to respondent, he was told respondent had no jobs that could accommodate his restrictions.

Nancy Dinell, respondent's human resources director, testified that respondent's records show that claimant clocked out of work on December 31, 2007, at 4:04 a.m. He reported back for work on January 2, 2008, and worked a full shift, clocking out at 6:30 a.m. on January 3, 2008. Ms. Dinell said that claimant's supervisor, Mr. Megia-Toscano, told her that he took claimant to the VA on December 31, 2007, because claimant was experiencing flank pain. Mr. Megia-Toscano did not testify. Ms. Dinell testified respondent did not know claimant was claiming a work-related injury until claimant filed a claim for family medical leave and short-term disability on or about January 31, 2008.[2]

Medical records from the VA were entered by stipulation of the parties. Those records show that on December 31, 2007, at about 5:30 a.m. claimant came in complaining of right low back pain. Claimant told the staff physician he was working the night shift at respondent and that the heavy lifting and repetitive bending and twisting aggravated his combat-related past back injury. He was given two trigger point injections. Claimant returned to the VA on January 3, 2008, at about 8:15 a.m. complaining of increased back pain. He was taken off work for three days. Claimant returned again to the VA on January 7, 2008, where he asked for and received work restrictions. On February 1, 2008, claimant had acupuncture treatment at the VA for his low back pain complaints.

Respondent sent claimant to Dr. Larry Wilkinson on February 18, 2008. Dr. Wilkinson found claimant had tenderness superior to the right sacroiliac joint. Claimant had a negative straight leg lifting test, deep tendon reflexes were within normal limits, and he was able to stand on toes and heels without difficulty. Dr. Wilkinson diagnosed claimant with chronic low back pain and recommended that he continue to follow up with the VA.

On April 15, 2009, at the request of claimant's attorney, claimant was seen by Dr. Pedro Murati, a certified independent medical examiner who is board certified in electrodiagnostic medicine and in physical medicine and rehabilitation. Dr. Murati reviewed claimant's medical records concerning his combat-related back injury. He noted that an MRI of claimant's back done at the VA in July 2006 showed a protrusion at T-11-12 and a disc osteophyte at L5-S1 producing minimum left neuroforaminal stenosis; a trigger point injection was performed on August 2, 2006; x-rays done February 5, 2007, showed narrowing at L5-S1 with anterior wedging at T12; and on March 30, 2007, claimant was given a cold laser phototherapy treatment.

[2] Those claims for family medical leave and short-term disability leave were denied because claimant had not worked for respondent long enough.

Dr. Murati also noted that claimant was seen and treated by Dr. Patrick Do beginning August 5, 2008. Dr. Do diagnosed claimant with low back pain and possible right lower extremity radicular pain. Claimant had another MRI on August 15, 2008, which showed a disk herniation at T11-12, a broad based left foraminal disk protrusion at L5-S1, and chronic compression of T12. Claimant had physical therapy and lumbar spine epidurals.

After examining claimant, Dr. Murati diagnosed him with aggravated low back pain with signs and symptoms of radiculopathy. He opined that within reasonable medical probability, claimant's diagnosis was a permanent aggravation of his combat-related injury at respondent on or about January 3, 2008. Based on the AMA *Guides*,[3] Dr. Murati rated claimant as having a 10 percent permanent partial impairment to the body as a whole.

Dr. Murati assigned claimant restrictions in which he was not to crawl or to lift, carry, push or pull more than 20 pounds. He should rarely bend, crouch or stoop. He could occasionally sit/stand, climb stairs and ladders, squat, and drive. He could frequently walk and lift, carry, push, and pull to 10 pounds. He should alternate sitting, standing and walking. With claimant's medical history, including his service-related injury and medical treatments, Dr. Murati testified that he would not have recommended claimant attempt to perform the heavy or very heavy manual labor job at respondent. Dr. Murati stated he did not have any VA records concerning the military's analysis and determination of claimant's service-related disability.

Dr. Murati reviewed a task list prepared by Jerry Hardin.[4] Of the 121 unduplicated tasks on the list, he opined that claimant was unable to perform 78 for a 64 percent task loss.[5]

Claimant was seen by Dr. Chris D. Fevurly, a board certified independent medical examiner who is also board certified in occupational medicine, on January 15, 2010, at the request of respondent. Dr. Fevurly reviewed claimant's medical records, including the records from the VA and the records of Dr. Do. Claimant told him he was injured at work on or about December 31, 2007, while attempting to maneuver a pallet. Claimant said his back pain is in the same location as it been since 2005. The only difference was that the

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Jerry Hardin, a human resources consultant, met with claimant on June 17 and 23, 2009, during which time he prepared a list of 121 tasks claimant had performed in the 15-year period before his work-related accident.

[5] The Award indicates that Dr. Murati spoke of 79 "No"s attached to his testimony. Dr. Murati actually opined claimant could not perform 78 of the tasks. He accidently circled one task that was a duplicate task, and it appears that was counted as a "no".

pain is worse. He said he had a constant low back ache with occasional lower extremity pain and numbness. The back pain is more severe than any lower extremity complaints.

After examination, Dr. Fevurly concluded that claimant had a five-year history of chronic recurrent low back pain and lumbar radiculopathy that preexisted his accident at work. Claimant has a service-connected disability for his low back pain that resulted from an incident that occurred while claimant was deployed in Iraq. Claimant told Dr. Fevurly he had preexisting permanent restrictions of no lifting greater than 50 pounds and no repetitive bending and stooping due to his service-related injury; however, Dr. Fevurly noted this information came from claimant and there were no VA records setting out those restrictions. Claimant told Dr. Fevurly he had recurrent low back pain from 2005 into 2007 and immediately prior to his employment at respondent.

Dr. Fevurly opined that the accident at respondent on or about December 31, 2007, included an acute temporary exacerbation of claimant's chronic preexisting low back pain. He found no significant or permanent change in claimant's preexisting clinical condition, MRI, or x-rays since 2004-05. He diagnosed claimant with low back pain with nonspecific lower extremity complaints consistent with regional non-neurogenic low back pain. He did not think claimant had radiculopathy, at least not at the time of his examination. He opined that claimant was at maximum medical improvement from the temporary exacerbation from the work events at respondent.

Dr. Fevurly said that there was no objective evidence in his evaluation upon which to assign new or additional permanent impairment as a result of the injury at respondent. Claimant told Dr. Fevurly he had a 40 percent service-connected disability.[6] Further, Dr. Fevurly said that he would not place any new permanent restrictions or limitations on claimant as a result of the accident at respondent. He believed that claimant's preexisting restrictions were reasonable.

Dr. Fevurly reviewed the task list prepared by Mr. Zumalt.[7] Of the 95 tasks on the list, he opined that claimant is unable to perform 22, for a 23 percent task loss.

In February 2008, claimant went to work as a safety attendant at Value Place earning $7 per hour and working 40 hours per week, which computes to a gross weekly wage of $280. When this is compared to claimant's pre-injury average weekly wage of $818.92, it results in a wage loss of 67 percent. Claimant worked for Value Place until sometime in August 2008, when he went to work for Independent Resource Living Center (IRLC), where

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[6] Claimant testified he believed he initially had a 30 percent service-connected disability, but the VA records indicate that his military disability was 40 percent.

[7] At the request of respondent, Dan Zumalt, a vocational rehabilitation counselor, met with claimant on various dates from January 27, 2010, through February 19, 2010. Mr. Zumalt prepared a list of 95 tasks claimant performed in the 15-year period before claimant's accident of December 31, 2007.

he also earned $7 an hour and worked 40 hours a week. His job at IRLC consisted of taking care of a quadriplegic, and after three weeks claimant quit because he could not physically handle the job. He has not worked since.[8]

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

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[8] Claimant was being paid temporary total disability benefits during this period. However, respondent is not claiming an overpayment of temporary total disability benefits.

[9] K.S.A. 2009 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[11] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[12] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[13] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[14]

K.S.A. 44-510e states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

ANALYSIS

The Board finds that claimant sustained personal injury by accident on December 31, 2007, that arose out of and in the course of his employment with respondent. The contemporaneous medical record supports this conclusion, as well as the eye-witness testimony of the respondent's witnesses. Claimant's preexisting low back injury was aggravated by his work-related accident and, as a result, claimant has additional restrictions and limitations. Respondent contends claimant's condition and permanent restrictions have not changed. However, claimant was able to perform his job duties for respondent before this injury, afterwards he could not. Because claimant has not returned to work earning 90 percent or more of his pre-injury average weekly wage, claimant's permanent partial disability is defined by K.S.A. 44-510e(a) as the average of his task loss and his wage loss. Two physicians have expressed opinions concerning the extent to which claimant has lost the ability to perform the work tasks he had previously performed during the 15 years before the accident. Dr. Murati utilized the task list prepared by Mr. Hardin and opined that claimant could no longer perform 78 of the 121 unduplicated tasks listed. Expressed as a percentage, this results in a 64 percent task loss. Dr. Fevurly reviewed the task list

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[12] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[13] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[14] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

prepared by Mr. Zumalt. Of the 95 tasks listed, Dr. Fevurly said claimant was unable to perform 22, for a 23 percent task loss. The Board finds both task loss opinions to be credible and will average the two opinions to find claimant's task loss is 43.5 percent.

While claimant was unemployed and had no earnings, his wage loss was 100 percent. When averaged with the task loss, claimant's permanent partial disability is 71.75 percent.[15]

The Board otherwise adopts and affirms the findings and conclusions of the ALJ.

CONCLUSION

(1) Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

(2) Claimant's permanent partial disability is 71.75 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 21, 2010, is modified as follows:

Claimant is entitled to 59 weeks of temporary total disability compensation at the rate of $510 per week or $30,090, followed by permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 71.75 percent work disability.

As of February 14, 2011, there would be due and owing to the claimant 59 weeks of temporary total disability compensation at the rate of $510 per week in the sum of $30,090 plus 104 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $53,040 for a total due and owing of $83,130, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $16,870 shall be paid at the rate of $510 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

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[15] During the period of time claimant was working post-accident, he earned $280 per week, and his wage loss was 67 percent. When this wage loss is averaged with his 43.5 percent task loss, claimant's permanent partial disability is 55.25 percent. However, because claimant was being paid temporary total disability benefits during this period and there is no claim of any overpayment, this period will not factor into the award calculation.

Dated this _____ day of February, 2011

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Alexander B. Mitchell, II, Attorney for Claimant
Larry Shoaf, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge